Nos. 83-1660 and 83-6381

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GILL PARKER, et al.,
Petitioners,

v.

JOHN R. BLOCK, Secretary
of Agriculture, et al.,

CHARLES M. ATKINS, Commissioner, Massachusetts Department of Public Welfare,
Cross-Petitioner,

v.

GILL PARKER, et al.,

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE STATES ILLINOIS, INDIANA, PENNSYLVANIA AND WISCONSIN IN SUPPORT OF CROSS-PETITIONER

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QUESTION PRESENTED

Whether due process requires that notices implementing legislatively mandated across-the-board welfare benefit reductions contain recipient-specific information.

TABLE OF CONTENTS
AND
TABLE OF AUTHORITIES

CASES CITED

OTHER AUTHORITIES PROVIDED

INTEREST OF AMICI CURIAE

Amici have each been involved in cases where the federal courts have ruled that due process requires that detailed recipient-specific information be contained in notices implementing federally mandated mass reductions in welfare benefits. See Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975); Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976); Dilda v. Quern, 612 F.2d 1055 (7th Cir.), cert. denied, 447 U.S. 935 (1980); Buckhanon v. Percy, 533 F. Supp. 822 (E.D. Wis. 1982), aff'd in part and rev'd in part, 708 F.2d 1209 (7th Cir. 1983), cert. denied, 104 S. Ct. 1281 (1984); Jones v. Blinziner, 536 F. Supp. 1181 (N.D. Ind. 1982); Philadelphia Welfare Rights Org'n. v. O'Bannon, 525 F. Supp. 1055 (E.D. Pa.

1981). Like this case, Buckhanon, Blinziner and O'Bannon involve across-the-board reductions in welfare benefits which were mandated by Pub. L. No. 97-35, the Omnibus Budget Reconciliation Act of 1981 ("OBRA"). In each of these cases, the courts have held that a federal decision that benefits should be reduced may not be implemented with respect to any recipient until such time as s/he is furnished with detailed recipient-specific information including mathematical calculations explaining precisely how his or her new, lower level of benefits was determined.

The costs incurred by the states as the result of these adverse decisions have been substantial. Enormous administrative burdens are incurred in computer programming and related forms of benefit computation, in devising notices

containing mathematical calculations and lengthy explanatory material and in completing mailings prior to legislatively imposed deadlines. Federal statutes, such as 42 U.S.C. §§ 603 and 1301(8)(A), which require the states to fund a proportionate share of these programs, in combination with the United States Department of Health and Human Services' efforts to recover federal matching funds under 45 C.F.R. § 201.6 (1983) have also forced the states to bear the brunt of the expense associated with continuing benefits at levels higher than those mandated by Congress. For example, in Buckhanon, a case which is still pending in the district court, Wisconsin estimates that over $1.5 million in benefits is still at issue and that the entire sum may ultimately have to be paid from state revenues.

The court of appeals' decision on the due process question continues to subject the states to the administrative burdens associated with having to prepare lengthy explanatory materials which include individualized calculations for millions of welfare recipients. The decision also continues to place the states and the federal government in jeopardy of having to comply with injunctions which extend prior levels of benefits, thereby granting multimillion dollar awards of state and federal revenues whenever a benefit reduction notice is subsequently determined to be constitutionally deficient.

SUMMARY OF ARGUMENT

The court below held that the food stamp benefit reduction notices issued by Massachusetts were constitutionally deficient because they "did not include

financial data for each individual recipient." Foggs v. Block, 722 F.2d 933, 936 (1st Cir. 1983).

Illinois, Indiana, Pennsylvania and Wisconsin challenge the conclusion that such financial data is constitutionally required. The federal regulations governing the issuance of notices afford purely procedural protections designed to allow recipients to plan for legislatively mandated benefit reductions. There is no statute or regulation which creates a substantive property right to the receipt of benefits at levels not authorized by Congress. Recipient-specific benefit notices therefore are not constitutionally mandated because no substantive property right is affected when benefit reductions prescribed by Congress are implemented.

ARGUMENT

Due Process Does Not Require That Notices Implementing Legislatively Mandated Across-The-Board Welfare Benefit Reductions Contain Recipient-Specific Information.

A. The due process protections of the fourteenth amendment extend only to individuals with a vested interest in liberty or property.

"The Due Process Clause applies when government action deprives a person of liberty or property ...." Greenholtz v. Inmates of Nebraska Penal & Cor., 442 U.S. 1, 7 (1979). "To determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71 (1972). Last term, in another due process case, this Court opined that:

> In theory a court might be able to define the scope of a

> patient's federally protected liberty interest without reference to state law. Having done so, it then might proceed to adjudicate the procedural protection required by the Due Process Clause for the federal interest alone.

Mills v. Rogers, 102 S. Ct. 2442, 2448 (1982).

There are no state created liberty or property interests at issue here. But, an individual could conceivably have a federally created property interest in the receipt of welfare benefits at preexisting levels. Compare Mills v. Rogers, 102 S. Ct. at 2448 n. 16, with Goldberg v. Kelly, 397 U.S. 254, 262 n. 8 (1970). Under the Court's holding in Greenholtz, 442 U.S. at 7, since this case involves "a claimed denial of due process," it is therefore necessary to "inquir[e] into the nature of the individual's claimed interest" in order to determine whether recipient-specific

information is constitutionally required in connection with legislatively imposed benefit reductions.

B. No deprivation of a property interest occurs in connection with legislatively imposed reductions in welfare benefits.

It has never been suggested that there is a constitutional right to any minimum level of subsistence in the form of the receipt of welfare benefits. Cf. Richardson v. Belcher, 404 U.S. 78, 82 (1971); Dandridge v. Williams, 397 U.S. 471, 487 (1970). The reason is that welfare involves the distribution of property rather than the preservation of liberty: "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law

...." Roth, 408 U.S. at 577. In the social benefit context, absent a showing of discriminatory intent, a legislative decision to reduce or eliminate benefits therefore may not be challenged on due process grounds because no "accrued property right" exists with respect to the continuation of such benefits. Flemming v. Nestor, 363 U.S. 603, 608 (1960). Any property interest that could exist in the continued receipt of welfare benefits would have to be "created and defined by statutory terms ...." Roth, 408 U.S. at 578. Thus, federal law "may recognize liberty [or property] interests more extensive than those independently protected by the Federal Constitution ... [or] confer procedural protections ... that extend beyond those minimally required by the Constitution of the

United States." Mills v. Rogers, 102 S. Ct. at 2449.

The federal regulations in effect now and at the time of the passage of OBRA require the states to give timely and adequate advance notice of legislatively imposed food stamp, Medicaid and AFDC benefit reductions. 7 C.F.R. § 273.13(a) (1981); 42 C.F.R. § 431.211 (1981); 45 C.F.R. § 205.10(a)(4)(i) (1981). AFDC benefit reduction notices must meet the requirements of 45 C.F.R. § 205.10(a)(4)(iii) (1981), which provides:

> When changes in either State or Federal law require automatic grant adjustments for classes of recipients, timely notice of such grant adjustments shall be given which shall be "adequate" if it includes a statement of the intended action, the reasons for such intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued.

The relevant MA regulation, 42 C.F.R. § 431.210 (1981), similarly mandates:

> (a) A statement of what action the agency intends to take;
>
> (b) The reasons for the intended action;
>
> (c) ... the change in Federal or State law that requires the action;
>
> (d) An explanation of --
>
> ....
>
> (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
>
> (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

The food stamp regulation is less stringent:

> A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to

> households to inform them of the change.

7 C.F.R. § 273.12(e)(2)(ii) (1981).

Not all procedural enactments protect an underlying substantive right. Substantively, "benefits are a matter of statutory entitlement for persons qualified to receive them." Goldberg v. Kelly, 397 U.S. at 262 (emphasis added). The notice provisions of the quoted regulations do no more than afford purely procedural protections. They do not provide any form of permanent entitlement to benefits at levels unauthorized by Congress if recipient-specific information is not furnished to each individual. By making extended benefits subject to recoupment, 7 C.F.R. § 273.15(k)(1) (1981), 42 C.F.R. § 431.230(b) (1981) and 45 C.F.R. § 205.10(a)(6)(i) (1981) expressly negate the contention that the regulations

themselves create substantive property rights. The regulations' purpose in requiring generalized notices is "to give all ... recipients an opportunity to adjust by having notice of a program change before any alteration is effectuated." Budnicki v. Beal, 450 F. Supp. 546, 551 (E.D. Pa. 1978). Stated another way, such notices are issued to allow recipients "to plan for the cut, and to the extent possible adjust to it ... [by providing] minimum advance warning to beneficiaries about to be deprived of benefits upon which they may have been counting heavily." Rochester v. Baganz, 479 F.2d 603, 606-07 (3rd Cir. 1973). With respect to the implementation of legislatively determined changes in benefit levels, "the soundness of such a [notice and hearing] procedure lies in its likelihood

of adoption of reasonable policies less prone to judicial attack, rather than in constitutional law." Provost v. Betit, 326 F. Supp. 920, 924 (D. Vt. 1971). Aside from the regulations, OBRA itself is the only federal enactment governing the implementation of the kinds of benefit reductions challenged in this case. But OBRA did not continue any substantive property right to receive a prior, higher level of benefits. To the extent that any such right may formerly have existed, OBRA extinguished it. Thus, there is no statute or regulation which creates a substantive property right to the receipt of benefits at preexisting levels when recipient-specific notices are not sent.

Without recitation of authority, the court of appeals held that Congress could extinguish what that court determined to

be an underlying substantive property interest only by entirely eliminating each benefit program, and that, "[s]o long as the programs exist," a deprivation of property occurs whenever benefits are reduced. Foggs v. Block, 722 F. 2d at 937. This reasoning stands the concept of due process on its ear. It means that detailed recipient-specific information would be constitutionally required whenever Congress chooses to cut benefits by twenty-five, fifty, or even ninety-nine percent, but that no notice whatsoever would be constitutionally required when benefits are extinguished -- presumably the situation when the individual would suffer the most grievous loss and would be most in need of a timely and adequate notice. The court of appeals seemingly recognized that any property interest which might exist in

the continued receipt of welfare benefits derives from statutory entitlement. It then failed to apprehend that any such property interest is subject to partial or complete alteration through legislative action.

The authorities cited by the court of appeals also do not support its alternative initial premise that "courts considering across-the-board statutory modification in federal public assistance programs" have "uniformly accepted" the "notion that statutory reductions infringe a protected property interest ...." Foggs v. Block, 722 F.2d at 937. Garrett v. Puett, 557 F. Supp. 9, 11 (M.D. Tenn. 1982), aff'd per curiam, 707 F.2d 930 (6th Cir. 1983) merely held that the benefit reduction notices issued in that case complied with the applicable procedural regulations and that those

regulations were not constitutionally infirm. Somewhat similar kinds of analyses were employed in Turner v. Walsh, 435 F. Supp. 707 (W.D. Mo. 1977) aff'd per curiam, 574 F.2d 456 (8th Cir. 1978); Benton v. Rhodes, 586 F.2d 1 (6th Cir. 1978); and Punohu v. Sunn, 666 P.2d 1135 (Hawaii 1983). With the exception of Garrett v. Puett, the six cases cited by the court of appeals, 722 F.2d at 937-938, either do not discuss the property interest question at all or short-circuit the two-step constitutional analysis required by such cases as Hagans v. Lavine, 415 U.S. 528, 543 (1974) and Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Since they do not first examine whether the applicable procedural regulations were complied with and then determine whether those regulations fail

to afford procedural protections sufficient to safeguard some kind of identifiable, constitutionally protected property interest, the constitutional conclusions reached by these courts lack foundation. The court of appeals' reasoning suffers from this same infirmity. It begs the question to conclude that, because a due process analysis was employed, a deprivation of property must have occurred. Foggs v. Block, 722 F. 2d at 940. A due process analysis may properly be employed only if a property interest is first identified. There simply is no well-reasoned authority for the proposition that the United States Constitution requires the issuance of detailed recipient-specific information in connection with welfare benefit reductions imposed by Congress because no

court has established the legal foundation for the concept that a deprivation of an accrued property right occurs when such legislative determinations are made.

The remedy which the court of appeals granted belies the existence of the property right which it claims to have identified. The district court's award of retroactive benefits was reversed because, "[r]estoration of benefits would constitute a windfall to recipients and would result in the continuation of benefits at a level exceeding that authorized by Congress." Foggs v. Block, 722 F.2d at 941. It is precisely because Congress extinguished any property right to receive benefits at these higher, preexisting levels that the due process claims raised by petitioners must fail.

The question presented in this case was left open at the time of the issuance of the Court's decision in Goldberg v. Kelly. See Wheeler v. Montgomery, 397 U.S. 280, 284-85 (1970) (Burger, C.J., dissenting). The Sixth Circuit and the Seventh Circuit are now at opposite ends of the legal spectrum. This Court has said that "there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations." Greenholtz, 442 U.S. at 7. If such a constitutional guarantee generally does not exist in connection with discretionary executive action, it can hardly exist when the executive branch is acting in compliance with a substantive legislative decision. The Court should hold that there is no underlying property interest protected by the procedural

federal regulations governing notice of the implementation of legislatively mandated benefit reductions. States that issue notices in compliance with those regulations will then no longer be subjected to subsequent court decisions granting multimillion dollar windfall awards of tax monies on constitutional grounds.

CONCLUSION

The court of appeals' determination that Massachusetts failed to accord its food-stamp recipients due process of law in connection with the issuance of across-the-board notices implementing a congressionally mandated reduction in benefits should be reversed.

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